No. 21685

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LBERT F. MONSMA,

Appellant,

-vs-

ENTRAL MUTUAL INSURANCE COMPANY,

Appellee.

BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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JURISDICTION AND PLEADINGS

A. Jurisdiction

Jurisdiction of the United States District Court for the District of Alaska was invoked under Title 28 USCA, Sec. 1447(b). The jurisdiction of the Court of Appeals rests on Section 1291 of the Federal Judicial Code, Title 28, USCA, and Rule 73, Federal Rules of Civil Procedure.

B. Pleadings

Appellant's Complaint was filed on June 21, 1965, in the Superior Court for the State of Alaska, Third Judicial District, based upon a claim against insurance company, defendants for a claimed fire loss. The case was removed on the basis of diversity of citizenship on July 19, 1965, to the District Court for the District of Alaska.

An Amended Complaint was filed on October 22, 1965, and the answer of the appellee herein to the Amended Complaint was filed on July 24, 1966.

A Stipulation for Dismissal without Prejudice and a Judgment of Partial Dismissal was entered on August 2, 1966, which dismissed the action as to all parties except the appellant and the appellee herein.

A formal judgment was entered on September 22, 1966, and a motion for new trial was filed on September 27, 1966.

The motion for new trial was denied by Minute Order dated November 18, 1966, and the Notice of Appeal was dated December 14, 1966, within the thirty day period allowed.

STATEMENT OF THE CASE

On August 24, 1964, Central Mutual Insurance Company, appellee herein, issued a fire insurance policy in the amount of $25,000.00, on property located at 2200 C Street, Anchorage, Alaska (Tr. 260). The policy was originally issued in the name of Mrs. Albert Monsma (Tr. 238). Because of a pending divorce between the Monsmas, the property involved in this matter was quitclaimed to the appellant, Albert Monsma, on September 25, 1964, and the information was given to the insurance company agent who handled the insurance (Tr. 265,281).

It was admitted by the appellee that the insurance policy was assigned to appellant by his wife on October 19, 1964 (Tr. 241). Appellant claims that he paid for the insurance (Tr. 112) and one of the appellant's exhibits carried a notation indicating that $75.00 of a check in the amount of $95.00 was for the house insurance (Plaintiff's Exhibit M, Tr. 209).

The appellee contends that the policy of insurance was cancelled under the date of January 4, 1965, and that notice of cancellation was mailed to interested parties on December 23, 1964. The appellee also offered copies of the notice of cancellation which bore the name of appellant, Albert F. Monsma, and not the name of his wife. Marian Monsma stated that she received a notice of cancellation addressed to appellant which had been forwarded to her at

13431 Brookgreen Drive, Dallas, Texas (Tr. 273, 276). She further stated that she returned the notice of cancellation to the appellee (Tr. 276, 277). There was no showing that a subsequent notice of cancellation was sent to appellant.

The appellant after taking over the interest of his wife (Tr. 34, 262), became the sole contract purchaser of the property from contract sellers, Bailey E. Bell and Virginia Reis. The contract was escrowed at a bank in Anchorage, Alaska, (Tr. 198).

In January, 1965, one of the contract sellers, Bailey E. Bell, determined through the bank escrow that an attempt was being made to cancel the policy (Tr. 202). As a result, this seller obtained a $15,000.00 policy with other companies to protect his own interest (Tr. 202). The policy so obtained was with Glens Falls Insurance Company and Kansas City Fire and Marine Insurance Company.

On January 16, 1965, a fire loss occurred at appellant's premises, and attempts were made to collect the insurance from the various insurance companies.

Suit was then filed in the name of appellant and the two contract sellers against the appellee and the other two insurance companies.

Before trial, the claim against the Glens Falls Insurance Company and Kansas City Fire and Marine Insurance Company was settled for $12,500.00 (Tr. 60), which sum was received by the two contract sellers. The net effect of the

settlement was to leave appellant, Albert F. Monsma, as the sole remaining plaintiff and Central Mutual Insurance Company as the sole remaining defendant.

The appellant has maintained throughout that he has never received a notice of cancellation nor any refund of the prepaid premium (Tr. 36,38,130, 361), however, the unearned premium was mailed to Marian Monsma by a check in the amount of $32.70, under date of February 11, 1965, after the fire loss (Tr. 254).

Prior to argument to the jury, appellee moved the court for a directed verdict on the grounds that no insurance contract had been entered into between Central Mutual Insurance Company and Albert Monsma, which motion was denied by the court (Tr. 371).

After argument, extensive objections to instructions were noted. After the jury had retired to deliberate, counsel for the appellee urged the giving of an instruction on presumption (Tr. 379). The appellant objected strenuously to the giving of such a supplemental instruction, but despite the objection, Supplemental Instruction No. 1 was given by handing it to the jurors. This instruction reads:

> "You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon, and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.
>
> The court inadvertently neglected to include this instruction in the instructions previously

given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.

You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law."

The record will show that the Special Verdict which was originally given to the jury contained an erroneous interrogatory on page 2, which reads:

"Interrogatory No. 3. Did the plaintiff, prior to the fire, enter into a novation with the defendant insurance company as defined in the instructions?

Answer to
Interrogatory No. 3. _____
(Yes or No) "

This was subsequently withdrawn and a corrected page 2 substituted, which reads:

"Interrogatory No. 3. Did the defendant insurance company, through its agent, cancel the insurance policy?

Answer to
Interrogatory No. 3. _____
(Yes or No)"

The appellant objected to the corrected Interrogatory on the ground that there was no evidence of any waiver of method of cancellation (Tr. 379). Further, appellant claimed that Interrogatory No. 4, which dealt with defects in the method of cancellation was entirely in conflict with Interrogatory No. 3, since if there had been a valid cancellation, there

would be no defects in it.

On September 9, 1966, the jury returned a verdict for the appellee; however they had not answered the Special Verdict Interrogatories (Suppl. Tr. 2), and were sent back for further deliberation. Prior to their retiring for further deliberation, the jury foreman questioned the court as to the meaning of the word "novation" (Suppl. Tr. 3). The court then indicated to the jury that through error, the second page of the jury's copy of the Special Verdict Interrogatories had not been changed, and that there were four interrogatories instead of five as previously given. The court then instructed the jury that the question of novation had been removed from the issue and it was to be disregarded (Suppl. Tr. 4). The jury then returned the Special Verdict in favor of the appellee (Suppl. Tr. 5).

After the jury was excused , appellant moved for a mistrial on the grounds that the jury had been unduly confused by the interrogatories that had been furnished them and by the belated offering of an instruction that had been filed late, which motion the court took under consideration on September 9, 1966 (Suppl. Tr. 6 & 7). The court deliberated until September 22, 1966, when a mistrial was denied and judgment entered for the appellee.

On September 27, 1966, appellant moved that the verdict of the jury be set aside, and that the judgment entered on the verdict be vacated and set aside and that a new trial be

granted, which motion was denied on November 18, 1966.

On December 12, 1966,appellant filed a Notice of Appeal from the Final Judgment, and from the Denial of Plaintiff's Motion to Grant a New Trial.

QUESTIONS PRESENTED FOR REVIEW

1. Should an instruction, offered late and belated drafted and given to the jury after argument and after the jury had retired, and particularly where the said instruction erroneously states the law of presumption pertaining to mailing, which matter is of crucial importance to the case herein, be permitted to stand?
2. Was the inadvertent giving of an interrogatory to the jury for the entire period of their deliberations, concerning an issue of novation which was not in the case, but which interrogatory was withdrawn after the jury had returned a verdict, sufficiently prejudicial to warrant a new trial?
3. Was the giving of an interrogatory on waiver of notice of cancellation prejudicially erroneous where there was a lack of the essential elements of waiver, and particularly where the jury found that such waiver had resulted?
4. Was the giving of interrogatories proper which resulted in inconsistent answers by the jury with the apparent result of confusing and misleading the jury?

All of the foregoing questions presented for review were raised in the proceedings following argument and after the jury had retired during the period of time that the court was taking exceptions to the proposed instructions.

SPECIFICATION OF ERRORS

I.

That the Court erred in submitting to the jury Supplemental Instruction No. 1, after the jury had retired, since the instruction unduly emphasized the question of mailing. The instruction reads:

> "You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon, and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.
>
> The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.
>
> You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law."

Objections were taken at the time of the trial to the giving of this instruction as follows:

> "MR. TALLMAN: I object to the giving of this instruction at this time for the reason it does place undue emphasis on this particular instruction, and I feel it was incumbent upon the defendant to have brought this to the attention of the court at the time of the reading of the previous instructions or at the time the previous instructions were noted by Your Honor or your Honor indicated what instructions you were giving. I feel that by the defendant waiting to raise this at this time after the instructions have been given is an attempt to

place this undue emphasis on the one instruction and to the detriment of the plaintiff. I think it is also objectionable since it was belatedly brought to the attention of the court, although I know Your Honor said you were not going to hold counsel to time limits. However Your Honor had made a previous ruling that there were time limits on instructions."

II.

That the Court erred in submitting the second page to the Special Verdict including the Interrogatory designated No. 3:

"Interrogatory No. 3. Did the plaintiff, prior to the fire, enter into a novation with the defendant insurance company as defined in the instruction?

Answer to Interrogatory No. 3. _____ (Yes or No)"

III.

That the Court erred in submitting Interrogatory No. 4.

"Interrogatory No. 4. Did the defendant insurance company, through its agent, cancel the insurance policy?

Answer to Interrogatory No. 4. Yes (Yes or No)"

That objections to the giving of this interrogatory were as follows:

"MR. TALLMAN: I would object to the special verdict in whole because I don't feel that there has been a showing as to why we should have this, and in particular I would object on the ground that no. 4 pertains to methods of cancellation or if there are any defects in the method of cancellation did plaintiff waive such defects on the ground that there is no evidence of any waiver of method of

cancellation."

IV.

That the Court erred in submitting interrogatories to the jury since the interrogatories were misleading, confusing and ambiguous.

SUMMARY OF ARGUMENT

The court erred in submitting to the jury Supplemental Instruction No. 1 after argument and after the jury had retired. This instruction emphasized the presumption of the receipt of mail.

The offer presented by the appellee, upon which the court based its own instruction, was offered late in the proceedings and consideration of this matter was not brought to the attention of the court and appellant until after argument and after the jury had retired. Appellant strenously objected because of the undue emphasis and the lateness of giving it, but the court gave the instruction, which in itself was an erroneous statement of the law because the evidence in the case at Bar had rebutted any presumption that would normally exist.

The court further erred in inadvertently submitting to the jury an interrogatory concerning the issue of novation. This interrogatory was with the jury until they had returned their verdict on the following day,although none of the interrogatories were answered at that time. The interrogatories were changed and the jury was sent back out, but the verdict had already been determined by the jury and the interrogatories were then answered. Appellant contends that the inadvertent interrogatory misled the jury.

Appellant further contends that the court erred in submitting interrogatories to the jury and in particular

Interrogatory No. 4 pertaining to waiver of methods of cancellation. One of the objections to Interrogatory No. 4 is that it was answered in an inconsistent manner to Interrogatory No. 3 and appellant objected to Interrogatory No. 4 upon the ground that there was no evidence of waiver of method of cancellation.

As noted above, appellant objected to any interrogatories since there was no showing by the court or appellee as to why any interrogatory should have been given that would unnecessarily emphasize some of the issues for no particular reason. In this regard it should be pointed out that the interrogatories were not for the purpose of enabling the court to reach a conclusion and served no purpose except to emphasize issues in favor of the appellee and against the appellant.

ARGUMENT

I.

THAT THE COURT ERRED IN SUBMITTING TO THE JURY SUPPLEMENTAL INSTRUCTION NO. 1, AFTER THE JURY HAD RETIRED.

It is appellant's contention that the jury was unduly influenced by the belated receipt of Supplemental Instruction No. 1, which emphasized the presumption of the receipt of the notice of cancellation by Appellant. It can be noted that appellee had ample time in which to submit the objectionable Supplemental Instruction No. 1 prior to the Court's giving the instructions to the jury, well knowing that the question of the mailing and receipt of the notice of cancellation was an integral part of his defense (Tr. 379-380). Even the answer alleges cancellation, so notice should be part of this proof. Therefore, by waiting until the jury had retired to deliberate, unreasonable emphasis of the presumption of receipt of the notice of cancellation resulted,and in the light of the subsequent verdict, the factor which apparently impressed them most.

The Court itself had reservations about the giving of the instruction (Tr. 379, 382), because of the undue emphasis the jury might place on it, even though this court were to give a cautionary instruction along with it to the effect that they should not give that particular instruction any more weight than any of the other instructions.

This instruction was not only untimely offered and

given after the jury had retired, but it is also erroneous as a matter of law. Because of the belated consideration of the instruction, this exception was only indirectly noted at the time of trial, by noting the emphasis on the presumption. However, it was pointed out to the court in appellant's motion for new trial. (R. 409-410)

Most federal cases in this area deal with the refusal of the District Court to give untimely offered instructions, e.g.:

> Likins-Foster Monterey Corp. vs. U.S., 308 F.2d,595;
> Wilson vs. Southern Farm Bureau Cas. Co., 275 F.2d, 819;
> Ostapenko vs. American Bridge Division of U.S. Steel Corp., 267 F.2d, 204

But for a clear statement of one court's interpretation under Rule 51, when instructions are to be offered see Kingsbury Breweries Company v. Schechter, 142 F. Supp., 219. The judge in this case stated at page 225:

> "Requests to charge the jury, when submitted, should be ready for trial purposes at the time the parties rest...The Court took the time to read, discuss and rule upon the requests, saying: 'Where these requests are not in the hands of the Court prior to this time, we are not supposed to consider them at all.***I will have to study these while you are arguing' to the jury."

Rule 51 of the Federal Rules of Civil Procedure appears to be quite plainly worded and clear in its intent:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as

> set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

In the case at Bar, it was obviously impossible for the court to "inform counsel of its proposed action upon requests prior to their arguments to the jury,..." for the simple reason that the instruction was not prepared until after argument to the jury, and, for that matter, not even drafted until after the jury had retired.

There is some authority that the court must inform counsel of its action upon requested instructions before argument. This appears to be a reasonable and practical rule enabling counsel to adequately prepare his argument. In this regard see Vol. 2B, Federal Practice and Procedure, Barron and Holtzoff, Section 1101, page 439:

> "§1101. IN GENERAL
> Under Rule 51 counsel, before argument to the jury, may submit written requests for instructions at the close of the evidence, unless the court reasonably requires the requests to be submitted earlier. Before the argument the court must inform counsel of its action upon the requests. The court's charge follows the argument. The purpose of Rule 51 is to enable counsel to know which requests will be granted or denied in order to argue the facts in the light of the

> law as the court will charge the jury. Counsel must take the initiative. He must submit written requests or make specific objections. Otherwise he will have acquiesced and, by consent to the ruling, will have waived objection..."

For a case authority supporting the above text see Evansville Container Corporation v. McDonald, 132 F.2d, 80. The court specifically noted the purpose of Rule 51 at page 84:

> "Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, authorizes the trial court to receive and rule on written requests for charges to the jury at any time during the trial or as the court reasonably directs and the rule further provides that 'the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury' and according to the terms of the rule 'no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections."

Also in accord:

> Terminal R. Association of St. Louis v. Staengel 122 F.2d 271

In the case at Bar, there is considerable evidence that appellant did not, in fact, receive the notice of cancellation. The witness, Marion M. (Monsma) Cox, stated that she received a notice of cancellation addressed to appellant at her residence in Dallas, Texas (Tr. 272 and 273). She further testified (Tr. 275,276, 277 and 280) that she believes she put scotch tape on the opened letter and returned it to the sender, Ken C. Johnson Agency. She testified that her usual

procedure in handling any correspondence received by her for appellant was to reseal it and return it to the sender (Tr.276) or to simply return it to the sender (Tr. 288). Appellant also categorically states that no notice was received by him. (Tr. 36,38) In view of this evidence, Supplemental Instruction No. 1 incorrectly states the law.

The jury in this case must have based their decision upon Supplemental Instruction No. 1, since the jury found against the plaintiff, and by interrogatories found that the insurance policy had been cancelled. Since the only evidence concerning "receipt" was that the plaintiff had not received a notice of cancellation, the jury would have to have been swayed by the presumption. In view of the evidence that was given, the presumption prevailed.

Appellant urges the court to consider the plain error of the instruction itself, since the instruction does not properly state the law. Appellant's counsel is aware of prior rulings of this Circuit covering the question of exception to instructions. However, this case is distinguishable from prior cases in that the instruction was so untimely offered and belatedly given that appellant's counsel had only a matter of seconds or at most a few minutes before stating his objections to the instruction.

Up until the time of the giving of Supplemental Instruction No. 1, counsel had not been advised concerning this particular instruction. The only statement that the

Court had made prior to advising counsel that it intended to give it was as follows:

> "THE COURT: Well, I actually intended to give it. I don't know what to do now. If I were to call the jury back, prepare an instruction, call the jury back and read it to them there might be a tendency that they would place undue emphasis on it." (Tr. 379)

Then shortly after this the court decided to give the instruction and then requested objections as indicated by the following:

> "THE COURT: I have prepared a supplemental instruction No. 1, which is predicated upon defendant's requested instruction No. 27, and I think it is warranted by the certificate of mail which is appended or is a part of the notice of cancellation, where Mrs. Kirkpatrick signed the certificate of mailing, and I intend to give this instruction, to the jury. It is my suggestion that I merely hand it to the bailiff to hand to the jury, but if the plaintiff requests I will have the entire jury returned to the courtroom and read it to them and then hand it to the foreman. What is your pleasure, Mr. Tallman?
>
> MR. TALLMAN: I think handing it to the jurors is all right, but I do have strenuous objections, Your Honor, and would like to have them noted.
>
> THE COURT: You may state your objections at this time, Mr. Tallman." (Tr. 380)

The offensive instruction was so untimely offered that even the counsel for appellee had apparently not checked the law on this particular point as indicated by the following shortly before the court decided to give the instruction:

"THE COURT:

I believe that's the extent of our objections.

Your objections to the form of special verdict both general and specific are noted.

Instruction No. 27, Mr. Delaney, I asked in my order that any special instruction requests be supported by authorities. I assume this is the law, do you have any authorities supporting it?

MR. DELANEY: I don't have at the present time, Your Honor. I understand that this is evidentiary presumption, in the absence of evidence to the contrary there is a presumption that mails reach the address to which they are addressed."(Tr. 379)

Since counsel for appellee, who proposed the instruction, had not been able to present the law on the presumption involved herein, it can hardly be argued that appellant's counsel could present such law in the brief time allowed. The proper rule of law is that when it is shown that a letter was prepared for mailing, was stamped and put into the mail, the presumption of its receipt is rebuttable, and is properly a question for the jury to decide.

The rule is clearly stated in Keeling v. Travelers Ins. Co.,Hartford, Conn., 67 P.2d, 944 (Oklahoma, 1937) by the court syllabus:

"1. When a party introduces proof that a letter, duly addressed to a person, is deposited in the United States mail and has thereon sufficient postage to insure its carriage, a presumption of fact arises that the addressee received the letter, and this presumption is rebuttable; and when the addressee introduces

proof he did not receive the letter, a presumption of fact arises that the letter was not mailed, and the issue of whether such letter was mailed is for the jury." (Emphasis added)

Alaska's Supreme Court has also adopted this rule in Hartsfield v. Carolina Casualty Insurance Co., 411 P.2d, 396 (Alaska,1966), at page 400:

"[5] We adopt the view of those courts which hold that the denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact."

For Text authority, see:

"IX, Wigmore on Evidence, 3rd Edition, §2519(B):

(B) In cases involving the application of this presumption, based on due mailing in the Government postal machinery, it becomes necessary to distinguish two issues raising different problems as to the sufficiency of evidence, viz. (a) cases where the issue under the pleadings is whether the letter was received;(b) cases where the issue under the pleading is whether the letter was mailed. (In both issues, we are to have in mind that the procedural effect of a presumption is to require (or justify) the conclusion unless some sufficient evidence to the contrary is introduced (ante, §2491), in which case the issue is before the jury merely on the relative strength of the conflicting evidence).

(a) Where the issue is whether the letter was received by the addressee, it often occurs that the addressee's testimony denies the arrival and receipt. This being some evidence to the negative of the issue, the binding effect of the presumption ends, and the issue goes to the jury to decide upon the weight of the evidence. On this point a Court is occasionally found holding that the uncontradicted testimony of the addressee denying the receipt 'entirely negatives the presumption,' and that therefore the jury cannot

find for the receipt; which is, of course, unsound because the jury may not believe the denial, as other Courts have pointed out.

(b) Whether the letter was mailed, becomes often the issue under the substantive law; for example, in charging an indorser of a negotiable instrument with a notice of the notarial protest, or in charging an insured with notice of a premium due; here the actual receipt of the letter becomes immaterial; the mailing suffices. But suppose that the addressee testifies in denial of the receipt? If this denial be believed, then is not the non-arrival of the letter some evidence that it was never mailed? The presumption above rests upon the supposed uniform efficiency of the postal service in delivering letters duly stamped, addressed, and mailed into its custody; if therefore the efficiency is operating, does not the non-arrival of an alleged letter indicate that such a letter was never given into the postal custody? Add to this, that the testimony to mailing comes usually from the mouth of persons who are vitally interested in proving the fact of mailing, e.g. a bank cashier who as notary mails notices of protest of the bank's negotiable instruments, or the agent of an insurer seeking to avoid a liability under the policy?

If therefore the addressee's testimony(also an interested witness) be believed, the non-arrival of such a letter is some evidence that no such letter was mailed; in short, it becomes essentially a question which testimony the jury will believe; therefore the case may go to the jury on that issue. This is the correct view, accepted by many Courts; some of them, however, limit such a ruling to cases where the testimony to mailing comes from an interested witness; some of them ask for something circumstantial in addition to the addressee's mere denial." (Emphasis supplied)

The instruction should not have been given.

II.

THAT THE COURT ERRED IN SUBMITTING THE SECOND PAGE TO THE SPECIAL VERDICT INCLUDING AN INTERROGATORY CONCERNING "NOVATION"

On September 9th, the day following the submission of the case to the jury, the jury brought in a verdict for the defendant. However, the jury had not answered the interrogatories, and they were sent out to deliberate further. (Supplemental Transcript page 2). Then the jury returned to the courtroom again for further instructions on the interrogatories because one of the interrogatories concerned the question of novation as the result of the submission of an incorrect page of the Special Verdict.

The submission of incorrect page 2 of the Special Verdict, containing the question concerning novation, resulted in introducing an element to the jury which was not at issue in the case at Bar, thereby confusing them as to the facts actually at issue.

In addition to this, Instruction No. 42, which explains the interrogatories of the Special Verdict, contains references to only four interrogatories, (R.394) whereas, the incorrect page 2 contained five interrogatories. (R.396) This, in itself, is sufficient to confuse the jury as to the issues on which they must decide. Subsequently , the jury was furnished with the corrected page 2, deleting the issue of novation. However, this does not alter the fact that from the

outset of their deliberations, until they reached a verdict, this issue was erroneously before them.

The fact that the extraneous issue was impressed upon their minds is evidenced by the question addressed to the Court by the jury foreman:

> "JURY FOREMAN: May I ask a question?
>
> THE COURT: Yes.
>
> JURY FOREMAN: On the word "novation" in one question, does that mean to approach or make a beginning?" (Suppl. Tr. 3)

Notwithstanding the Court's instruction to the jury to disregard the issue of novation (Suppl. Tr. 4), both the erroneous introduction of the issue, unintentional though it may have been, compounded by the Court's explanation as to the reason for its being introduced, served to impress the issue upon the minds of the jury. These circumstances unquestionably led to confusion of the jury during their deliberations.

In Ward v. Cochran, 150 U.S. 597; 37 L.Ed.1195, where the trial court added oral instructions additional to the instruction formally given, the U. S. Supreme Court stated at page 1199:

> "Nor do we think that this is one of those cases in which erroneous or insufficient instructions in one part of a charge are corrected or supplied by unobjectionable instructions, on the same questions, appearing in another part. It is evident that the attention of the jury must have been withdrawn from the instructions formally given, as requested, to those announced by the judge, as given on his own motion, and it seems evident that this

action of the court misguided the jury, and led them to overlook essential questions involved in the issue they were trying."

In the instant case, although this was not an instruction given by the Court on its own motion, we have a parallel situation. The attention of the jury was focused on the withdrawn issue, thereby causing them in their deliberations to place less emphasis than they normally would have on the actual issues in question.

III.

THAT THE COURT ERRED IN SUBMITTING INTERROGATORY NO. 4 PERTAINING TO WAIVER OF METHODS OF CANCELATION FOR THE REASON THAT THERE WAS NO EVIDENCE OF SUCH WAIVER AND FURTHER THAT THE COURT ERRED IN SUBMITTING ANY INTERROGATORIES TO THE JURY. (Spec. of Errors Numbers 3 and 4)

A. INTERROGATORY NO. 4.

The appellant objected to the giving of interrogatories in this matter on the ground that there was no showing as to why we should have such interrgatories and further the appellant objected to Interrogatory No. 4 on the ground that there was no evidence of any waiver of method of cancellation.

The first two interrogatories were answered by the jury as "not applicable" and since they found for the defendant, this answer would be sufficient, since both pertain to items of damages. However, Interrogatories Nos. 3 and 4

are the objectionable ones and they are quoted herewith with the answers:

> "Interrogatory No. 3. Did the defendant insurance company, through its agent, cancel the insurance policy?
>
> Answer to Interrogatory No. 3. Yes (Yes or No)
>
> Interrogatory No. 4. If there were any defects in the method of cancellation, did the plaintiff waive such defects?
>
> Answer to Interrogatory No. 4 Yes (Yes or No)"
>
> /s/ (Dietrich Rempel, Foreman) (R. 394)

The appellant had objected to the giving of any interrogatories (Tr. 378-379) and in particular objected to the giving of Interrogatory No. 4 upon the ground that there was no evidence of waiver of method of cancellation. It should also be noted that Instruction No. 15 pertains to defects in the cancellation of an insurance policy being waived, and this was objected to by the appellant as follows:

> "MR. TALLMAN: I object to No. 15 on the ground that there is no waiver of policy requirements of notice, there is no evidence of the waiver of policy requirements of notice on the part of plaintiff, and I further object to the instruction on the ground that I feel it is a misstatement of the law that the acquiesence of the insure in purchase of another insurance policy to replace the cancelled policy would be a waiver. I don't think that's the law and I think it's erroneous and object to that, and I also object on the ground that the insured making a claim against a subsequent insurance company would constitute a waiver."Tr.376-377)

Instruction No. 15 reads:

"The plaintiff, Albert F. Monsma, may waive any of the provisions of the policy with regard to cancellation. The waiver may be by express words or may be inferred from the conduct of the plaintiff. Defects, if any, in the cancellation of an insurance policy may be waived by acceptance by the insured of such cancellation after learning of it; or by acquiescence by the insured in the purchase of another insurance policy to replace the cancelled policy; or by the insured making a claim aginst such subsequent insurance company. A waiver once made cannot be recalled.

The test is whether such acts or conduct by the plaintiff would indicate to a man of ordinary judgment and prudence that the plaintiff intended to waive any such defects in the cancellation of the policy.

Therefore, if you find from the evidence that an insurance contract came into effect between the plaintiffand the defendant, and that the defendant cancelled such insurance policy, but that there were technical defects in such cancellation; but that the ~~xxx~~ plaintiff waived such defects as above defined, then your verdict must be for the defendant notwithstanding your finding on any other issues submitted to you in this case." (R.357)

The appellant first urges that the Interrogatory No. 4 is inconsistent with Interrogatory No. 3. The Interrogatory No. 3 which is answered "Yes" indicated that the jury found that the insurance company through its agent cancelled the insurance policy. The only contention on the part of the appellee is that the insurance company mailed notices of cancellation to the appellant and, therefore, the only method of cancelling it would have been through the mail. Then, under Interrogatory No. 4 the jury found that if there were

any defects in the method of cancellation that they had been waived. But this is inconsistent with Number 3 for the reason that if it were cancelled and done by mail, then there are no defects to be waived. In any event, this Interrogatory No. 4 permits broad speculation by the jury, since defects in the method of cancellation cannot be shown by the record.

It is true that Instruction No. 15 infers that defects may be waived by acceptance of such cancellation after learning of it or by acquiesence by the insured in the purchase of other insurance, none of which can be supported by the record. However, the objection which is before this court is to the interrogatory and Instruction No. 15 can probably be considered only as it relates to the Interrogatory No. 4. The inconsistency of both Instruction No. 15 and Interrogatory No. 4 is with the actual proof that it was offered by the defense, namely, that the policy was cancelled by mailing notices.

The first time the question of waiver came up was in the proposed instructions, since there is no evidence offered on this, and it was not pleaded in the defendant's answer. (R. 178-181)

"Waiver" is an affirmative defense under Rule 8 of the Federal Rules of Civil Procedure and is required to be set forth affirmatively. However, the position taken by appellant is that there was no evidence to support waiver, anyway.

The law on waiver is adequately set forth in 28 Am.

Jur. 2d, Estoppel and Waiver, page 839:

"§157. GENERALLY: EXISTENCE OF RIGHT, PRIVILEGE, OR ADVANTAGE.

The term 'waiver' implies a choice or an election to dispense with something of present value or to forgo some present advantage. Therefore, to constitute a waiver, the right or privilege claimed to have been waived must generally have been in existence at the time of the purported waiver. A person cannot waive a right before he is in a position to assert it. It is not required, however that in order for a right to be waived it should be one upon which an action would lie at the time.

Voluntary choice is of the very essence of waiver. It is a voluntary act which implies a choice by the party to dispense with something of value,or to forgo some right or advantage which he might at his option have demanded and insisted on.

No fraud or misrepresentation is necessary for a waiver. Nor is it a requisite of a waiver, as it is of an equitable estoppel, that prejudice result to the party in whose favor the waiver operates.

§158. KNOWLEDGE AND INTENTION.

It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or of all the material facts upon which they depended. No man can be bound by a waiver of his rights unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear. Ignorance of a material fact negatives waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact. Waiver presupposes a full knowledge of an existing right or privilege and something done designedly or knowingly to relinquish it. However, it is not necessary, in order to waive a claim, that a party be certain of the correctness of the claim and of its legal efficacy; it is enough if he knows of the exis-

tence of the claim and of its reasonably possibly efficay.

Waiver is mainly, or essentially, a matter of intention. Thus, a prerequisite ingredient of the waiver of a right or privilege consists of an intention to relinquish it. Indeed, the essence of a waiver, as indicated by its definition, is the voluntary and intentional relinquishment of a known right, claim, or privilege. Whether an alleged waiver is expressed or implied, it must be intentional. Mere negligence, oversight, or thoughtlessness does not create a waiver. In some instances, however, a statutory waiver may be established without proof of an actual intention to relinquish a known right..."

This court in a 1963 case appears to substantially follow the above text authority as indicated by the following:

United States v. Chichester, 312 F.2d, 275 (CA 9,1963) wherein the court states at page 283:

"[6] From our review of the decisions, and assuming without deciding that other elements absent from this case need not be present, we are satisfied that as minimum requirements to constitute an implied waiver of substantial rights, the conduct relied upon must be clear, decisive and unequivocal showing a purpose to waive the legal rights involved before such conduct constitutes a waiver..."

Also in accord, Pacific States Corporation v. Hall, 166 F.2d, 668, (CA 9, 1948).

The jury should not have been permitted to speculate on the issue of waiver.

B. NO INTERROGATORIES SHOULD HAVE BEEN GIVEN.

The appellant objected to the giving of any interrogatories upon the ground that there was no basis for the giving of such interrogatories. (Tr. 378-379) In view of what happened, namely, the inconsistent findings under interrogatories Nos. 3 and 4, it now appears that interrogatories were confusing and misleading. And, further, the jury did apparently reach a verdict without even answering the interrogatories, since the verdict was brought in on the morning of the 9th of September, 1966, in blank. Perhaps the reason that the interrogatories were not answered was that they were confusing and misleading. (Suppl. Transcript 1.)

It should be noted that Instruction No. 42 adequately instructed the jury on the Special Verdict which further supports the proposition that they were undoubtedly confused and mislead by the special interrogatories.

No valid reason has ever been put forth by the court or by the appellee as to why isolated issues should be selected for emphasis by way of special verdict in this case. No special findings were needed by the court for any purpose, since this was a simple suit for money based upon an insurance policy and a fire loss. In addition, the jury had been adequately instructed by some forty-four instructions and one supplemental instruction that there was no need to emphasize the issues against the plaintiff, appellant,herein.

The purpose of the Special Verdict appears to be set forth in 90 ALR 2d, 1041:

"§1. INTRODUCTION.

A special verdict is one in which the jury finds the facts, and the decision of the cause is made by the court. A special finding, which is made in response to a special interrogatory propounded with reference to a particular fact, is made in connection with a general verdict.

The design of special verdicts, issues, or interrogatories is to obtain to the greatest extent possible the decision of the jury without reflection of the bias or prejudice of the jury. The intent is to obtain an answer that does not reflect the jury's opinion or knowledge as to the effect of their answer on the ultimate rights or liabilities of the parties.

To achieve the stated goal it is often announced that a trial court should not inform the jury of the effect of their special verdict or finding upon the ultimate rights or liabilities of the parties. It is desired that the jury not know how to answer to enable a particular party to prevail. There is a recognized exception to the general rule, to the effect that it is not error to inform the jury of matters that they necessarily know as a result of the conduct of the trial..."

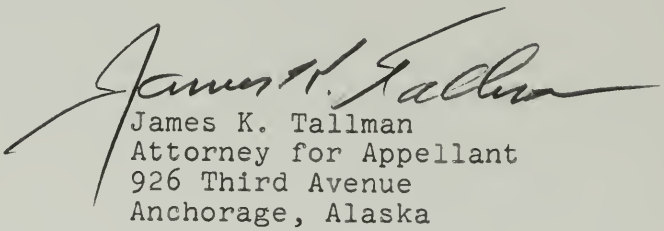
It does not appear that in the case at Bar any of the basic reasons set forth above were present in the case at Bar and the Special Verdict should not have been given.

CONCLUSION

In conclusion, appellant contends that anyone or all of the above designated errors is so prejudicial as to warrant a new trial.

Appellant respectfully requests that judgment of the Court below be reversed and a new trial ordered.

Respectfully submitted this 7th day of July, 1967.



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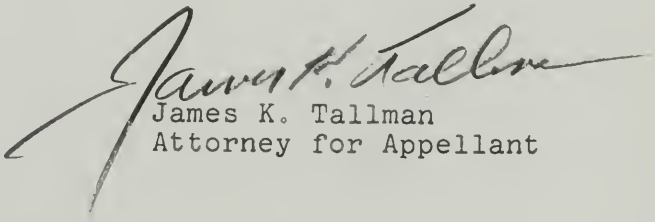
CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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